In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

GUY W. OLANO, JR., AND RAYMOND M. GRAY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

TABLE OF AUTHORITIES

Cases: Page

Cases—Continued: Page

Cases—Continued: Page

Statute and rules:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1306

UNITED STATES OF AMERICA, PETITIONER

v.

GUY W. OLANO, JR., AND RAYMOND M. GRAY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

---

1. Respondents fault the district court for its "flagrant" and "deliberate disregard" (Olano Br. 19, 25) of Federal Rule of Criminal Procedure 24(c), and for its decision to "deviat[e] from the explicit command" (Gray Br. 6) of the rule. Respondents paint a picture of a court that was determined to follow its preferred practice in the face of the plain language of the rule, and they explain the decision by counsel for the seven defendants "to go along" with the court's desires as an effort "to avoid offending the court." Olano Br. 25. Respondent Gray also argues that his counsel "unequivocally" (Gray Br. 4) objected to the suggestion that the alternates accompany the jury, an objection that was later "brushed aside" (Olano Br. 25) by the court.

That is not a fair characterization of what happened at trial. The record makes clear that the district court left the matter of the disposition of the alternates up to counsel. The court prefaced the discussion of the proposal to permit the alternates to remain with the jury during deliberations by saying that "if there is even one person who doesn't like it we won't do it." J.A. 79. The court stated that "unless it's something you all agree to, it's not worth your spending time hassling about." *Ibid.* The court went on to explain that "it's just a suggestion," and stated that it did not want the question whether to permit the alternates to accompany the jury "to be a big issue." *Ibid.* The court then told counsel to "[t]hink about it and let me know." *Ibid.* Rather than portraying a court that needed to be "appease[d]" because it "clearly did not want to follow" (Olano Br. 42) the law, the record demonstrates that the court was flexible on the matter and left to the defendants the decision whether to permit the alternates to remain with the jury. No one called the language of Rule 24(c) to the court's attention, and there is no indication that the court adverted to that language, much less determined to act in defiance of the rule.

The court later returned to the issue, and the following colloquy occurred, J.A. 82:

> THE COURT: [H]ave you given any more thought as to whether you want the alternates to go in and not participate, or do you want them out?
>
> MR. ROBISON [counsel for respondent Gray]: We would ask they not.
>
> THE COURT: Not.

Rather than stating an unequivocal objection to permitting the alternates to accompany the jury, counsel's response to the court's compound question was decidedly ambiguous. The court inquired whether the alternates should "go in and not participate," and counsel responded that he preferred they "not." Although the court did not pursue the matter (and thus did not indicate its interpretation of counsel's response), the response could easily have been interpreted as expressing a preference that the alternates not participate in the deliberations, but not suggesting that they be excluded while the jury was deliberating.

Whatever the meaning of Gray's counsel's response, events on the following day made clear that the defendants, including Gray, did not object to permitting the alternates to observe the deliberations. Referring to an off-the-record discussion, the court noted its understanding that the defendants "all agree that all fourteen deliberate," and sought confirmation of that understanding. J.A. 86. The court specifically asked whether the defendants "want[ed the court] to instruct the two alternates not to participate in deliberation[s]." *Ibid.* Counsel for one of the defendants responded, "[i]t's my understanding that the conversation was the two alternates go back there instructed that they are not to take part in any fashion in the deliberations." *Ibid.*

Counsel for Gray, along with counsel for all the other defendants, remained silent as the court confirmed that the defendants "all agree[d]" that the alternates could observe the deliberations. Counsel for all the defendants remained silent when the jury was instructed; their silence continued when the alternates accompanied the jury at the outset of the deliberations and when the jury continued its delib-

erations up to the time of the verdict. No complaints were heard when the jury returned its verdict, or at any time while post-trial motions were pending. Even on appeal, all the defendants except respondent Olano, proceeding *pro se*, remained silent about the issue. Counsel's silence, we submit, suggests either that none believed error had been committed, or that they were satisfied with the choice they had made. Thus, the record demonstrates that respondents not only failed to object to the error, but affirmatively consented to the practice that they now characterize as an egregious violation of their rights.

2. Reviewing courts are properly reluctant to reverse convictions based on claims of error when the defense has "invited" the error by consenting to the procedure followed at trial.[1] Respondent Olano ignores the invited error doctrine altogether, preferring instead to blame the district court for following a pro-

[1] *E.g.*, *United States* v. *Nagi*, 947 F.2d 211, 214 (6th Cir. 1991), cert. denied, 112 S. Ct. 2309 (1992); *United States* v. *Lopez-Escobar*, 920 F.2d 1241, 1246 (5th Cir. 1991); *United States* v. *Pungitore*, 910 F.2d 1084, 1143 n.84 (3d Cir. 1990), cert. denied, 111 S. Ct. 2009 (1991); *United States* v. *Angiulo*, 897 F.2d 1169, 1216 (1st Cir.), cert. denied, 111 S. Ct. 120 (1990); *United States* v. *Eagle Thunder*, 893 F.2d 950, 953 (8th Cir. 1990); *United States* v. *Rodriquez-Cardenas*, 866 F.2d 390, 395-396 (11th Cir. 1989), cert. denied, 493 U.S. 1069 (1990); *United States* v. *Muskovsky*, 863 F.2d 1319, 1329 (7th Cir. 1988), cert. denied, 489 U.S. 1067 (1989); *People of Territory of Guam* v. *Alvarez*, 763 F.2d 1036, 1038 (9th Cir. 1985); *United States* v. *Young*, 745 F.2d 733, 752 (2d Cir. 1984), cert. denied, 470 U.S. 1084 (1985); *United States* v. *Mangieri*, 694 F.2d 1270, 1280 (D.C. Cir. 1982); *United States* v. *Riebold*, 557 F.2d 697, 708 (10th Cir.), cert. denied, 434 U.S. 860 (1977); *United States* v. *White*, 377 F.2d 908, 911 (4th Cir.), cert. denied, 389 U.S. 884 (1967).

cedure to which his counsel consented. Respondent Gray, on the other hand, cites (Gray Br. 32) three instances in which courts of appeals have failed to invoke the invited error doctrine, and asserts that it therefore "does not matter whether counsel • • • ratified the error or consented to the error." *Ibid.*[2] He does not acknowledge the well-established rule that invited errors cannot serve as the basis for reversal except in the most extreme cases, and he does not suggest that this case is one of the extraordinary ones in which the error is so obvious, and so egregiously prejudicial, that counsel's consent in the trial court should be disregarded.

3. The centerpiece of respondent Olano's argument (Olano Br. 17-33) is his contention that we have misread Fed. R. Crim. P. 52(b), the federal plain error rule. According to Olano, reversal is required under the plain error rule if the district court commits an error that is (1) obvious, and (2) not shown to be harmless within the meaning of the harmless error rule, Fed. R. Crim. P. 52(a).

a. Because an error that is harmless under Rule 52(a) cannot provide the basis for reversal in any event, Olano's argument reduces to the contention that an error is "plain," and thus cognizable in spite of the absence of any objection at trial, if the error can be characterized as "obvious." That approach to plain

[2] All three cases cited by respondent Gray dealt with the definition of willfulness in a jury instruction, an issue that the courts characterized as central to the dispute between the parties. See *United States* v. *Pabisz*, 936 F.2d 80 (2d Cir. 1991); *United States* v. *Aitken*, 755 F.2d 188 (1st Cir. 1985); *United States* v. *Krosky*, 418 F.2d 65 (6th Cir. 1969). By contrast, the procedural issue presented in this case obviously did not bear directly on the central substantive issue at trial.

error is contrary to this Court's decisions; it would lead to pointless disputes about whether an error is obvious or less than obvious (but still error); and it would call for reversal in a number of cases in which defendants, either for tactical reasons or because they regarded the matter as unimportant, have failed to make the contemporaneous objection required by Fed. R. Crim. P. 51.

Contrary to Olano's contention, Rule 52(b) does not mandate relief whenever a court finds an error that is obvious and non-harmless. The rule grants courts the power to review "plain errors or defects affecting substantial rights," even in the absence of an objection, but the Court has made clear that "the power granted [to courts of appeals] by Rule 52(b) is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *United States* v. *Frady*, 456 U.S. 152, 163 n.14 (1982); see *United States* v. *Young*, 470 U.S. 1, 17 (1985). As Justice Brennan has observed, "Rule 52(b) permits, rather than directs, the courts to notice plain error; the power to recognize plain error is one that the courts are admonished to exercise cautiously, * * * and resort to only in 'exceptional circumstances,'" *United States* v. *Frady*, 456 U.S. at 180 (Brennan, J., dissenting; citations omitted); 2 Charles Alan Wright, *Federal Practice and Procedure* § 856, at 338 (2d ed. 1982). Following that mandate, the courts of appeals have consistently noted that a non-harmless error under Rule 52(a) is not necessarily a plain error under Rule 52(b), and have instead required "much more" of a showing of prejudice to establish the latter. *United States* v. *Blackwell*, 694 F.2d 1325, 1341 (D.C. Cir. 1982); see also

United States v. *McKinney*, 954 F.2d 471, 475-76 (7th Cir. 1992), petition for cert. pending, No. 92-5360; *Government of the Virgin Islands* v. *Smith*, 949 F.2d 677, 682 (3d Cir. 1991); *United States* v. *Lechuga*, 888 F.2d 1472, 1480 (5th Cir. 1989); *United States* v. *Thame*, 846 F.2d 200, 207 (3d Cir.), cert. denied, 488 U.S. 928 (1988); *United States* v. *Acevedo*, 842 F.2d 502, 508 n.1 (1st Cir. 1988); *United States* v. *Dixon*, 562 F.2d 1138, 1143 (9th Cir. 1977), cert. denied, 435 U.S. 927 (1978).

To constitute plain error, the error must "undermine the fundamental fairness of the trial and contribute to a miscarriage of justice." *United States* v. *Young*, 470 U.S. at 16.[3] In language that directly addresses and answers Olano's argument, the Court has stated:

---

[3] Rule 52(b) uses the verb "may" and thus describes a class of cases within which a court is authorized to notice errors to which an objection was not made. Rule 52(a), by contrast, uses the verb "shall" and thus imposes a limitation on the reviewing court's power to notice errors that do not affect substantial rights. As indicated in the statement by Justice Brennan quoted above, this Court has directed that the authority granted by Rule 52(b) is to be exercised only in exceptional circumstances, and normally only when the error has severely prejudiced the defendant in a way that casts doubt on the accuracy of the verdict.

In exceptional cases, plain error can be noted if an error is so grievous that it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936); see 2 Charles Alan Wright, *supra*, § 856, at 340-341. That application of the rule, however, is reserved for gross departures from proper trial conduct. Permitting two alternate jurors to observe the jury's deliberations can hardly be said to bring federal court proceedings into public disrepute.

> An error, of course, must be more than obvious or readily apparent in order to trigger appellate review under Federal Rule of Criminal Procedure 52(b). * * * '[F]ederal courts have consistently interpreted the plain-error doctrine as requiring an appellate court to find that the claimed error not only seriously affected "substantial rights," but that it had an unfair prejudicial impact on the jury's deliberations. Only then would the court be able to conclude that the error undermined the fairness of the trial and contributed to a miscarriage of justice.

United States v. *Young*, 470 U.S. at 17 n.14; see also *Namet* v. *United States*, 373 U.S. 179, 190 (1963) (plain error rule protects against "obviously prejudicial" errors); *United States* v. *Robinson*, 485 U.S. 25, 36 (1988) (Blackmun, J., concurring in part and dissenting in part) (harmless error analysis requires a "more sensitive prejudice standard" than plain error analysis).

b. While we agree that the district court erred in this case, it is not so clear that the error was "obvious." Although Rule 24(c) provides that the district court shall discharge the alternate jurors at the outset of deliberations, it does not address the question whether the parties can consent to a waiver of that procedure. Olano points to the absence of any reference to consent in the language of the rule and concludes that the rule is therefore "absolute," and that the district court therefore acted in "deliberate disregard" of its "plain and unambiguous terms." Olano Br. 25. The vehemence of Olano's argument on that point seems misplaced, however, in light of his concession elsewhere in his brief that the court of appeals was correct in holding that the requirements of the rule could be waived if a waiver were entered

personally by the defendants, instead of merely by their counsel. Olano Br. 10-11 n.4. If the requirements of the rule can be waived by the personal consent of the parties, even in the absence of a provision for such consent, it is unclear why the requirements of the rule cannot be waived by the parties' consent expressed through counsel. See *Peretz* v. *United States*, 111 S. Ct. 2661, 2669 (1991); Pet. Br. 26-29. There is certainly nothing in Rule 24(c) that would distinguish between those two cases.[4]

c. The procedure employed by the district court in this case did not undermine the integrity of the jury process, as respondents would have the Court believe. Respondents characterize the alternate jurors as "outsiders" to the jury's deliberations, and they urge the Court to treat this case as if the district court had invited two strangers from off the street to participate in the jury's deliberations. But the alternate jurors cannot fairly be regarded as equiva-

---

[4] We believe that the rule does not authorize alternates to remain with the deliberating jurors, even if the defendants personally consent to that procedure. A court following the rule therefore should not permit the alternates to remain even if the defendants wish that they be permitted to do so. Of course, if the defendants consent to the procedure and the court allows the alternates to remain with the deliberating jury—as happened here—plain error principles should bar a reversal based on the error.

Olano's argument that the procedure is permissible when defendants personally consent underscores a point we made in our opening brief: that a defendant may perceive it to be in his tactical interest to have the alternates remain with the jury. Olano's argument, if accepted, would retain that option for defendants. But that merely shows why the error of permitting the alternate jurors to remain is not "inherently prejudicial," as Olano elsewhere maintains.

lent to true outsiders whose presence would violate the sanctity of the jury room.

Respondents do not dispute that for most purposes alternate jurors and regular jurors are indistinguishable. They argue, however, that there is one "vital respect" (Olano Br. 39; see also Gray Br. 17-20) in which regular and alternate jurors differ, and that the difference calls for a rule of automatic reversal in every case. According to respondents, because alternate jurors have no part in the decision-making process and do not share moral responsibility for the verdict, their presence necessarily taints the jury's deliberations. In respondents' view, "there is every reason to believe" that the presence of alternates "during deliberations is prejudicial to defendants" because alternates "may take less seriously the important protections afforded * * * by the criminal justice system." Olano Br. 40; Gray Br. 18-20. That argument is based entirely on speculation and finds no support in this Court's cases.

There is no reason to suppose that alternate jurors will make light of the protections afforded to criminal defendants merely because they do not vote on the verdict. Respondents' argument to the contrary ignores not only the shared characteristics of the alternate and regular jurors, but also the fact that the alternates were instructed not to participate in the deliberations. Respondents assert that it is "fanciful" (Olano Br. 38) and inconsistent with "common sense reality" (Gray Br. 16) to assume that the alternate jurors followed that instruction. That assertion, however, is at odds with "the almost invariable assumption of the law that jurors follow their instructions." *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987); *Francis* v. *Franklin*, 471 U.S. 307,

325 n.9 (1985).[5] Because the alternates were instructed not to deliberate, and because they shared every relevant characteristic with the regular jurors except their authority to deliberate and vote, it is entirely reasonable to expect that the presence of the alternates would have no effect on the jury's deliberations.[6]

This Court has not justified the need for jury secrecy on the ground that only the 12 regular jurors are responsible for and committed to the verdict that they reach. See Olano Br. 39-40; Gray Br. 20. To the contrary, outside influences on the jury have been condemned by this Court for two reasons: first, that jury exposure to extraneous materials threatens the right to trial by an impartial jury, see *Parker* v. *Gladden*, 385 U.S. 363 (1966); *Turner* v. *Louisiana*,

---

[5] There is no reason the defendants could not have sought to determine whether the alternates participated in the jury's deliberations. Federal Rule of Evidence 606 would not bar an inquiry into whether the alternates violated the instruction not to participate in the deliberations. See *Tanner* v. *United States*, 483 U.S. 107 (1987); *State* v. *Meuey*, 476 N.W.2d 846, 853-854 (Neb. 1991) (juror affidavits regarding whether alternates participated in deliberations permissible under state law equivalent to Rule 606). In order to determine whether the alternates followed the instruction not to deliberate, it would not be necessary to inquire into the substance of the jury's deliberations or the jurors' mental processes, subjects that are barred from inquiry by Rule 606.

[6] Respondent Olano also argues that the regular jurors would find the silence of the alternates jarring in light of their prior shared experience. See Olano Br. 37. That seems quite unlikely. The district court explained to all the jurors that the alternates were to play no role in the deliberations. The jury therefore had every reason to expect that the alternates would remain silent during the process.

379 U.S. 466 (1965); and second, that jurors should not have to deliberate in fear "that their arguments and ballots [may] be freely published to the world." *Clark* v. *United States*, 289 U.S. 1, 13 (1933). Neither danger is present in this case.

The presence of alternates does not pose a danger of compromising the impartiality of the jury, because "the alternate who accompanies the regular jurors into deliberations has no more and no less information about the case than any other juror, and is no more biased or unduly influenced than any other juror." *Johnson* v. *Duckworth*, 650 F.2d 122, 125 (7th Cir.), cert. denied, 454 U.S. 867 (1981). Nor does the presence of the alternates in the jury room pose an undue danger that the jury's votes and deliberations will be made public. The alternates in this case remained under oath and received the same instructions as the rest of the jury. Moreover, the alternates were selected in the same manner as the rest of the jurors, and all were treated alike during the three months of the trial. There was therefore no reason for the jurors to fear that the alternates would be any more likely to disclose the contents of the deliberations than any other member of the jury.[7]

d. Although respondents have failed to show any specific prejudice as a result of the Rule 24(c) violation that may have led to a miscarriage of justice, they argue that the error was "inherently prejudicial" and should lead to reversal even in the absence of a showing of specific prejudice to their case. That argument, however, overlooks this Court's admonition that "[a] *per se* approach to plain-error review is flawed," *United States* v. *Young*, 470 U.S. at 17 n.14, and that under the plain error standard, prejudice must be assessed on a case-by-case basis.

[7] Because alternate jurors are members of the jury until they are discharged (alternate jurors "shall have the same functions, powers, facilities and privileges as the regular jurors," Fed. R. Crim. P. 24(c)), Olano is incorrect in asserting (Olano Br. 35-36) that the alternates' presence during deliberations violated 18 U.S.C. 1508. If Olano's interpretation were correct, a defendant could not lawfully consent to a waiver of the requirements of Rule 24(c), as Olano argues he may, see Olano Br. 10-11 n.4.

Respondents' "inherent prejudice" argument is based on a fundamental mistake: they suggest that because the procedure they challenge here will "inevitably threaten[] the deliberative process," it must be regarded as prejudicial. Olano Br. 35; Gray Br. 19-20. Even if they are right that permitting the alternate jurors to remain in the jury room is likely to have affected the jury's deliberations, however, it is far from clear that the procedure favored the government. For the reasons set forth in our opening brief (Pet. Br. 21), it is at least equally likely that it favored the defense. Accordingly, there is no reason to assume that any effect of the presence of the alternate jurors during deliberations was necessarily prejudicial to the defendants and should lead to reversal in spite of the defendants' consent.

By invoking the concept of "inherent prejudice," respondents confuse the principles of plain error with those of harmless error. As we argued in our opening brief (Pet. Br. 17-20), an error can be "inherently prejudicial"—*i.e.*, one that can never be harmless—but nonetheless not call for reversal under the plain error standard. A ruling that a certain kind of error is inherently prejudicial—and therefore never harmless—rests on the difficulty of determining whether such an error had an impact on the trial, and

not on the conclusion that the error causes prejudice in every case. See *Arizona* v. *Fulminante*, 111 S. Ct. 1246, 1265 (1991); *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927).[8]

Even if the error in this case were "inherently prejudicial," in the sense that it could never be harmless error, there would be no basis for reversing under the plain error standard. The reason is simple. Respondents' counsel made a tactical decision at trial to permit the alternates to join the jury during deliberations. The record does not reflect the reasons underlying that decision, but several can be posited. Counsel may have concluded that the alternates were favorably disposed toward the defense; counsel may have thought that having a larger number of jurors in the jury room would make a unanimous vote for conviction marginally less likely; or counsel may simply have concluded that the presence of alternates during deliberations was a matter of complete indifference to their case, and they may have agreed to the procedure

[8] Gray's reliance on *Gray* v. *Mississippi*, 481 U.S. 648 (1987), and *Vasquez* v. *Hillery*, 474 U.S. 254 (1986), underscores our point. In those cases the Court held errors affecting the composition of the grand jury or petit jury to be "inherently prejudicial," and thus not subject to harmless error review, because of the difficulty in determining the effect of the errors on the verdict. But the Court did not suggest that those errors would be cognizable in the absence of an objection by the defendant, and in fact lower courts have held that errors affecting the composition of the jury ordinarily do not rise to the level of "plain error." See *United States* v. *Simmons*, 961 F.2d 183, 185 n.1 (11th Cir. 1992); *United States* v. *Anzalone*, 886 F.2d 229, 234 (9th Cir. 1989); *United States* v. *Salamone*, 800 F.2d 1216, 1222 (3d Cir. 1986); *United States* v. *Flores-Elias*, 650 F.2d 1149, 1151 (9th Cir.), cert. denied, 454 U.S. 904 (1981).

for the reason given by the court—as an accommodation to the alternate jurors.[9]

e. Olano argues (Olano Br. 32-33) that our position improperly equates the standard necessary to establish plain error with that necessary to avert a procedural default on collateral review. He contends that the difference in the standards for plain error and collateral attack support his contention that the degree of prejudice necessary to establish plain error is the same as that necessary to establish that an error is not harmless.

The principal difference between the standards applicable to plain error and collateral review is that on collateral review the petitioner must show "cause" for his procedural default, while no such showing is required in the case of plain error. A second difference is that a habeas corpus petitioner seeking to overcome a procedural default must make an even more compelling showing of prejudice than is required to establish plain error on direct appeal. *United States* v. *Frady*, 456 U.S. 152, 166 (1982); *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977).

[9] Because there are plausible tactical reasons for the decision to permit alternates to observe the jury deliberations, respondents are incorrect to suggest that the failure to object in this case constituted constitutionally ineffective assistance of counsel. See Olano Br. 15; Gray Br. 4, 28. Moreover, respondents once again make the mistake of equating error with prejudice. Even if the district court's procedure with respect to the alternates was an obvious error, as respondents contend, that does not lead to the conclusion that they were obviously prejudiced by it. This is not a case involving an oversight by counsel; rather, counsel for the defendants considered the question overnight and made a deliberate decision to agree to the procedure. Counsel may well have concluded that having the alternates in the jury room served the defendants' interests at trial, and they may have been right.

As we have noted, the plain error standard normally requires proof that the error in question had "an unfair prejudicial impact" on the trial, *United States* v. *Young*, 470 U.S. at 17 n.14, or "undermine[d] the fundamental fairness of the trial and contribute[d] to a miscarriage of justice," *id.* at 16. To overcome a procedural bar on collateral review, a petitioner must show that the challenged action "infect[ed] [the] entire trial with error of constitutional dimensions," *Murray* v. *Carrier*, 477 U.S. 478, 494 (1986), and resulted in "a fundamentally unjust incarceration," *Engle* v. *Isaac*, 456 U.S. 107, 135 (1982). To be sure, the difference in the two standards may not produce a different outcome in many cases. What is clear from both lines of cases, however, is that the showing of prejudice required under both the "cause and prejudice" standard and the "plain error" standard is greater than the showing needed to establish that a particular error is not harmless under the harmless error rule.

4. Respondents argue that the court of appeals' decision in this case is consistent with decisions of state courts and the lower federal courts. As we demonstrated in our petition (Pet. 7-9), however, the federal courts of appeals have split on the issue presented in this case; in fact, only the Fourth, Ninth, and Tenth Circuits have adopted a rule of automatic reversal such as the one urged by respondents. Moreover, contrary to respondent Gray's suggestion (Gray 16-20), the state courts are far from unanimous in requiring reversal in cases in which alternate jurors accompany the jury during deliberations. To the contrary, many state courts have adopted the approach we urge here, which requires a defendant to show prejudice resulting from the presence of alternates during deliberations. See, *e.g.*, *State* v. *Menuey*, 476 N.W.2d 846 (Neb. 1991); *Luster* v. *State*, 515 So. 2d 1177 (Miss. 1987); *People* v. *Valles*, 593 P.2d 240 (Cal. 1979); *Johnson* v. *State*, 369 N.E.2d 623 (Ind. 1977), cert. denied, 436 U.S. 948 (1978); *People* v. *Rhodes*, 231 N.E.2d 400 (Ill. 1967); *State* v. *Blair*, 516 N.E.2d 240 (Ohio Ct. App. 1986).

5. Respondent Olano takes issue (Olano Br. 44-45) with our argument that the costs of a reversal should be considered in determining whether to excuse a defendant's failure to object at trial. As we have noted, Rule 52(b) permits, but does not require, that plain errors be noticed. In determining whether to notice a plain error, it is entirely appropriate for a reviewing court to consider the costs to the criminal justice system of requiring a new trial in spite of the defendant's failure to object to an erroneous procedure at trial. See *United States* v. *Young*, 470 U.S. at 22 n.1 (Brennan, J., concurring in part and dissenting in part) ("the societal costs of reversing [the] conviction and requiring a retrial" should be considered in plain error analysis); see generally *Morris* v. *Slappy*, 461 U.S. 1, 15 (1983) ("The spectacle of repeated trials to establish the truth about a single criminal episode inevitably places burdens on the system in terms of witnesses, records, and fading memories, to say nothing of misusing judicial resources."). Respondents should not be allowed to undo the efforts of the court, the prosecutor, the jurors, and the witnesses throughout a three-month, multi-defendant trial by capitalizing on a procedural error to which they consented.

Respondent Olano (Olano Br. 14-15) is sharply critical of the prosecutor for permitting the error to occur in this case. Under the circumstances, however,

neither the prosecutor nor the district court deserves such criticism. In light of prior Ninth Circuit precedent permitting alternates to accompany the regular jurors in some circumstances (see Pet. App. 25a) and the unanimous consent of the defendants to the procedure used in this case, the prosecutor and the court could reasonably have expected the Ninth Circuit to uphold the procedure, and certainly not to find plain error.

From the perspective of the litigants at trial, the matter of the alternates was a minor housekeeping detail that passed without significant notice; in the district court's words, it was not "a big issue." J.A. 79. Under prior Ninth Circuit precedents, it was far from clear that the district court was committing error at all, much less that the court's error would be found to be so grave as to call for reversal in spite of the defendants' consent. Of course, with perfect hindsight and the leisure of appellate consideration, it is easy now to say that the court and the prosecutor should have avoided the problem in this case by insisting that the alternates be discharged. But it is unfair, we submit, to place principal responsibility for the error on the prosecutor and the court, when the defendants at trial did not suggest that it was in any way objectionable, and in fact unanimously consented to the procedure.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

OCTOBER 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 60066